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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID BENGOA and JOSE COLULA, on behalf of themselves and others similarly situated,	:	Case No.
Plaintiffs,	:	**COMPLAINT**
-against-	:	
M&F RESTAURANT CORPORATION d/b/a SPOLINI'S ITALIAN RESTAURANT, and SERGIO LAZZINARO,	:	
Defendants.	:	

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Plaintiffs, DAVID BENGOA and JOSE COLULA (hereinafter, "Plaintiffs"), on behalf of themselves and other similarly situated employees, by and through their undersigned attorneys, Cilenti & Cooper, PLLC, file this Complaint against defendants, M&F RESTAURANT CORPORATION d/b/a SPOLINI'S ITALIAN RESTAURANT ("SPOLINI'S") and SERGIO LAZZINARO (collectively, "Defendants"), and state as follows:

INTRODUCTION

1. Plaintiffs allege that, pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), they are entitled to recover from the Defendants: (1) unpaid minimum wages, (2) unpaid overtime compensation, (3)

liquidated damages, (4) prejudgment and post-judgment interest; and (5) attorneys' fees and costs.

2. Plaintiffs further allege that, pursuant to the New York Labor Law, they are entitled to recover from the Defendants: (1) unpaid minimum wages; (2) unpaid overtime compensation; (3) unpaid "spread of hours" premium for each day in which they worked a shift in excess of ten (10) hours; (4) liquidated damages and civil penalties pursuant to the New York Labor Law and the New York State Wage Theft Prevention Act; (5) prejudgment and post-judgment interest; and (6) attorneys' fees and costs.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this controversy pursuant to 29 U.S.C. §216(b), 28 U.S.C. §§ 1331, 1337 and 1343, and has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

4. Venue is proper in the Eastern District pursuant to 28 U.S.C. § 1391 because the conduct making up the basis of the complaint took place in this judicial district.

PARTIES

5. Plaintiffs are each residents of Queens County, New York.

6. Defendant, SPOLINI'S, is a domestic business corporation organized under the laws of the State of New York, with a principal place of business at 116-25 Metropolitan Avenue, Kew Gardens, New York 11418.

7. Defendant, SERGIO LAZZINARO, is the Chief Executive Officer, President, owner, shareholder, director, supervisor, proprietor, and/or managing agent of SPOLINI'S, who actively participated, and continues to actively participate, in the day-

to-day operations of SPOLINI'S during all relevant times and acted intentionally and maliciously and is an employer pursuant to the FLSA, 29 U.S.C. § 203(d) and Regulations promulgated thereunder, 29 C.F.R. § 791.2, as well as New York Labor Law § 2 and the Regulations thereunder, and is jointly and severally liable with SPOLINI'S.

8. Defendant, SERGIO LAZZINARO, exercised control over the terms and conditions of Plaintiffs' employment in that he had the power and authority to: (i) hire and fire employees, (ii) determine rates and method of pay, (iii) determine work schedules and hours worked, (iv) supervise and control the work of employees, and (v) otherwise affected the quality of the employees' employment.

9. Upon information and belief, at all relevant times, SPOLINI'S was, and continues to be, an "enterprise engaged in commerce" within the meaning of the FLSA in that it (i) has and has had employees engaged in commerce or in the production of goods for commerce, or that handle, sell, or otherwise work on goods or materials that have been moved in or produced for commerce, and (ii) has and has had an annual gross volume of sales of not less than $500,000.

10. Except for a period of approximately five and one-half (5½) months, Plaintiff, DAVID BENGOA, was continuously employed by Defendants in Queens County, New York to work as a non-exempt dishwasher, cleaner, stock person, and salad preparer for Defendants' Italian restaurant from in or about June 2011 until on or about January 16, 2013.

11. Except for a period of approximately two (2) weeks, Plaintiff, JOSE COLULA, was continuously employed by Defendants in Queens County, New York to work as a non-exempt dishwasher, cleaner, stock person, kitchen helper, and salad

preparer for Defendants' Italian restaurant from in or about July 2011 until on or about January 8, 2013.

12. At all relevant times, the work performed by Plaintiffs was directly essential to the business operated by Defendants.

13. At all relevant times, Defendants knowingly and willfully failed to pay Plaintiffs their lawfully earned minimum wages in direct contravention of the FLSA and New York Labor Law.

14. At all relevant times, Defendants knowingly and willfully failed to pay Plaintiffs their lawfully earned overtime compensation in direct contravention of the FLSA and New York Labor Law.

15. At all relevant times, Defendants knowingly and willfully failed to pay Plaintiffs their lawfully earned "spread of hours" premium in direct contravention of the New York Labor Law.

16. Plaintiffs have satisfied all conditions precedent to the institution of this action, or such conditions have been waived.

STATEMENT OF FACTS

17. In or about June 2011, Plaintiff, DAVID BENGOA, was hired by Defendants to work as a non-exempt dishwasher, cleaner, stock person, and salad preparer for Defendants' Italian restaurant, known as Spolini's, which is located at 116-25 Metropolitan Avenue, Kew Gardens, New York.

18. Except for a period of approximately five and one-half (5½) months between June 3, 2012 and November 15, 2012, Plaintiff continuously worked for the Defendants in such capacities until on or about January 16, 2013.

19. During the course of Plaintiff's employment by Defendants, he typically worked over forty (40) hours per week.

20. Throughout his employment, Plaintiff typically worked six (6) days a week, and his work shift normally consisted of eleven (11) hours per day, from 1:00 p.m. until 12:00 a.m.

21. From the start of his employment and continuing through approximately September 2011, Plaintiff was not paid proper minimum wages or overtime compensation. Plaintiff was paid $400 per week, straight time for all hours worked, and worked approximately sixty-six (66) hours per week (for a regular rate of pay of $6.06 per hour). Work performed above forty (40) hours per week was not paid at the statutory rate of time and one-half as required by state and federal law.

22. Beginning in or about October 2011 and continuing through approximately December 2011, Plaintiff was not paid proper minimum wages or overtime compensation. Plaintiff was paid $425 per week, straight time for all hours worked, and worked approximately sixty-six (66) hours per week (for a regular rate of pay of $6.44 per hour). Work performed above forty (40) hours per week was not paid at the statutory rate of time and one-half as required by state and federal law.

23. Beginning in or about January 2012 and continuing through approximately June 2, 2012, Plaintiff was not paid proper minimum wages or overtime compensation. Plaintiff was paid $450 per week, straight time for all hours worked, and worked approximately sixty-six (66) hours per week (for a regular rate of pay of $6.82 per hour). Work performed above forty (40) hours per week was not paid at the statutory rate of time and one-half as required by state and federal law.

24. Upon returning to work for the Defendants on or about November 16, 2012 and continuing through the remainder of Plaintiff's employment on or about January 16, 2013, Plaintiff was not paid proper minimum wages or overtime compensation. Plaintiff was paid $470 per week, straight time for all hours worked, and worked approximately sixty-six (66) hours per week (for a regular rate of pay of $7.12 per hour). Work performed above forty (40) hours per week was not paid at the statutory rate of time and one-half as required by state and federal law.

25. In or about July 2011, Plaintiff, JOSE COLULA, was hired by Defendants to work as a non-exempt dishwasher, cleaner, stock person, kitchen helper, and salad preparer for Defendants' Italian restaurant, known as Spolini's, which is located at 116-25 Metropolitan Avenue, Kew Gardens, New York.

26. Except for a period of approximately two (2) weeks between the end of July 2011 and the middle of August 2011, Plaintiff continuously worked for the Defendants in such capacities until on or about January 8, 2013.

27. During the course of Plaintiff's employment by Defendants, he typically worked over forty (40) hours per week.

28. Throughout his employment, Plaintiff typically worked six (6) days a week, and his work shift normally consisted of eleven (11) hours per day, from 1:00 p.m. until 12:00 a.m.

29. From the start of his employment and continuing through approximately December 2011, Plaintiff was not paid proper minimum wages or overtime compensation. Plaintiff was paid $425 per week, straight time for all hours worked, and worked approximately sixty-six (66) hours per week (for a regular rate of pay of $6.44

per hour). Work performed above forty (40) hours per week was not paid at the statutory rate of time and one-half as required by state and federal law.

30. Beginning in or about January 2012 and continuing through approximately May 2012, Plaintiff was not paid proper minimum wages or overtime compensation. Plaintiff was paid $450 per week, straight time for all hours worked, and worked approximately sixty-six (66) hours per week (for a regular rate of pay of $6.82 per hour). Work performed above forty (40) hours per week was not paid at the statutory rate of time and one-half as required by state and federal law.

31. Beginning in or about June 2012 and continuing through the remainder of Plaintiff's employment on or about January 8, 2013, Plaintiff was not paid proper minimum wages or overtime compensation. Plaintiff was paid $470 per week, straight time for all hours worked, and worked approximately sixty-six (66) hours per week (for a regular rate of pay of $7.12 per hour). Work performed above forty (40) hours per week was not paid at the statutory rate of time and one-half as required by state and federal law.

32. Defendants knowingly and willfully operated their business with a policy of not paying either the FLSA minimum wage or the New York State minimum wage to Plaintiffs and other similarly situated employees.

33. Defendants knowingly and willfully operated their business with a policy of not paying Plaintiffs and other similarly situated employees either the FLSA overtime rate (of time and one-half), or the New York State overtime rate (of time and one-half), in direct violation of the FLSA and New York Labor Law and the supporting federal and New York State Department of Labor Regulations.

34. Upon information and belief, at all relevant times, including during the course of Plaintiffs' employment, the Defendants failed to maintain accurate and sufficient time and pay records.

STATEMENT OF CLAIM

COUNT I
[Violation of the Fair Labor Standards Act]

35. Plaintiffs re-allege and re-aver each and every allegation and statement contained in paragraphs "1" through "34" of this Complaint as if fully set forth herein.

36. At all relevant times, upon information and belief, Defendants were and continue to be an employer engaged in interstate commerce and/or the production of goods for commerce within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a). Further, Plaintiffs are covered individuals within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

37. At all relevant times, Defendants employed Plaintiffs within the meaning of the FLSA.

38. Upon information and belief, at all relevant times, Defendants have had gross revenues in excess of $500,000.

39. Plaintiffs worked hours for which they were not paid the statutory minimum wage.

40. Defendants had, and continue to have, a policy and practice of refusing to pay the statutory minimum wage to Plaintiffs for hours worked.

41. Defendants failed to pay Plaintiffs minimum wages in the lawful amount for hours worked.

42. Plaintiffs were entitled to be paid at the rate of time and one-half the statutory minimum for all hours worked in excess of the maximum hours provided for in the FLSA.

43. If Plaintiffs were paid above the statutory minimum at any time during the course of their employment, they were entitled to be paid at the rate of time and one-half their regular rate of pay for all hours worked in excess of the maximum hours provided for in the FLSA.

44. Defendants failed to pay Plaintiffs overtime compensation in the lawful amount for all hours worked in excess of the maximum hours provided for in the FLSA.

45. At all relevant times, Defendants had, and continue to have, a policy and practice of refusing to pay overtime compensation at the statutory rate of time and one-half to Plaintiffs for all hours worked in excess of forty (40) hours per work week, which violated and continues to violate the FLSA, 29 U.S.C. §§ 201, *et seq.*, including 29 U.S.C. §§ 207(a)(1) and 215(a).

46. Defendants knowingly and willfully disregarded the provisions of the FLSA as evidenced by their failure to compensate Plaintiffs at the statutory minimum wage rate and the statutory overtime rate of time and one-half for all hours worked in excess of forty (40) hours per week, when they knew or should have known such was due and that non-payment of minimum wages and overtime compensation would financially injure Plaintiffs.

47. As a result of the Defendants' failure to properly record, report, credit and/or compensate its employees, including Plaintiffs, the Defendants have failed to make, keep and preserve records with respect to each of its employees sufficient to

determine the wages, hours and other conditions and practices of employment in violation of the FLSA, 29 U.S.A. §§ 201, *et seq.*, including 29 U.S.C. §§ 211(c) and 215(a).

48. Defendants failed to properly disclose or apprise Plaintiffs of their rights under the FLSA.

49. As a direct and proximate result of Defendants' disregard of the FLSA, Plaintiffs are entitled to liquidated damages pursuant to the FLSA.

50. Due to the intentional, willful and unlawful acts of the Defendants, Plaintiffs suffered damages in an amount not presently ascertainable of unpaid minimum wages and unpaid overtime compensation, an equal amount as liquidated damages, and prejudgment interest thereon.

51. Plaintiffs are entitled to an award of their reasonable attorneys' fees, costs and expenses, pursuant to 29 U.S.C. § 216(b).

COUNT II
[Violation of the New York Labor Law]

52. Plaintiffs re-allege and re-aver each and every allegation and statement contained in paragraphs "1" through "51" of this Complaint as if fully set forth herein.

53. At all relevant times, Defendants employed Plaintiffs within the meaning of New York Labor Law §§ 2 and 651.

54. Defendants knowingly and willfully violated Plaintiffs' rights by failing to pay Plaintiffs minimum wages in the lawful amount for hours worked.

55. Defendants knowingly and willfully violated Plaintiffs' rights by failing to pay Plaintiffs overtime compensation at the rate of time and one-half for each hour worked in excess of forty (40) hours in a workweek.

56. Defendants knowingly and willfully violated the rights of Plaintiffs and by failing to pay "spread of hours" premium for each day they worked in excess of ten (10) hours pursuant to New York State Department of Labor Regulations §§ 142-2.4; 146-1.6.

57. Defendants failed to furnish Plaintiffs with a statement with every payment of wages listing gross wages, deductions, and net wages, in contravention of New York Labor Law § 195(3) and New York State Department of Labor Regulations § 146-2.1.

58. Defendants failed to keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and other similar information in contravention of New York Labor Law § 661.

59. Defendants failed to establish, maintain, and preserve for not less than six (6) years payroll records showing the hours worked, gross wages, deductions, and net wages for each employee, in contravention of the New York Labor Law § 194(4), and New York State Department of Labor Regulations § 146-2.1.

60. Due to the Defendants' New York Labor Law violations, Plaintiffs are entitled to recover from Defendants their unpaid minimum wages, unpaid overtime compensation, unpaid "spread of hours" premium, reasonable attorneys' fees, and costs and disbursements of this action, pursuant to New York Labor Law § 663(1) *et al.* and § 198.

61. Plaintiffs also seek liquidated damages pursuant to New York Labor Law § 663(1), as well as civil penalties and/or liquidated damages pursuant to the New York State Wage Theft Prevention Act.

PRAYER FOR RELEIF

WHEREFORE, Plaintiffs, DAVID BENGOA and JOSE COLULA, on behalf of themselves and all similarly situated employees, respectfully requests that this Court grant the following relief:

(a) An award of unpaid minimum wages due under the FLSA and New York Labor Law;

(b) An award of unpaid overtime compensation due under the FLSA and New York Labor Law;

(c) An award of unpaid "spread of hours" premium due under the New York Labor Law;

(d) An award of liquidated damages as a result of Defendants' failure to pay minimum wages and overtime compensation pursuant to 29 U.S.C. § 216;

(e) An award of liquidated damages as a result of Defendants' failure to pay minimum wages, overtime compensation, and "spread of hours" premium pursuant to the New York Labor Law and the New York State Wage Theft Prevention Act;

(f) An award of civil penalties pursuant to the New York State Wage Theft Prevention Act;

(g) An award of prejudgment and post-judgment interest;

(h) An award of costs and expenses associated with this action, together with reasonable attorneys' and expert fees; and

(i) Such other and further relief as this Court determines to be just and proper.

Dated: New York, New York
February 12, 2013

Respectfully submitted,

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By: ______________________________
Justin Cilenti (GC 2321)

CONSENT TO SUE UNDER
FAIR LABOR STANDARDS ACT

I, David Bengoa, am an employee formerly employed by Spolini's Restaurant, and/or related entities. I consent to be a plaintiff in the above-captioned action to collect unpaid wages.

Dated: New York, New York
Jan 10th, 2013

x [signature]

Sworn to before me this 10
day of January 2013.

[signature]
Notary Public

GIUSTINO CILENTI
Notary Public, State of New York
No. 02CI6240824
Qualified in New York County
Commission Expires May 9, 2015

CONSENT TO SUE UNDER
FAIR LABOR STANDARDS ACT

I, Jose Colula, am an employee formerly employed by Spolini's Restaurant and/or related entities. I consent to be a plaintiff in the above-captioned action to collect unpaid wages.

Dated: New York, New York
January 10, 2013

Sworn to before me this 10
day of January 2013.

Notary Public

GIUSTINO CILENTI
Notary Public, State of New York
No. 02CI6240824
Qualified in New York County
Commission Expires May 9, 2015